

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MILFORD CENTER, GENESIS ELDER CARE

Employer

and

CARPENTERS EAST COAST INDUSTRIAL COUNCIL,
UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO

Petitioner

CASE 5-RC-14873

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.^{1/}
3. The labor organization involved claims to represent certain employees of the Employer.^{2/}
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for the following reasons:^{3/}

SEE ATTACHED

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570. This request must be received by the Board in Washington by **September 3, 1999**.

Dated August 20, 1999

at Baltimore, MD

Regional Director, Region 5



1/ The parties stipulated and I find that: Milford Center, Genesis Elder Care (hereinafter the Employer) is a Delaware corporation with an office and place of business in Milford, Delaware; the Employer is engaged in providing skilled nursing and long-term care to the elderly; during the last 12 months, a representative period, the Employer, in the course and conduct of its business operations described above, derived gross revenues in excess of \$100,000; during the same period, the Employer, in the course and conduct of its business operations described above, purchased and received supplies and goods valued in excess of \$5,000 directly from points located outside the State of Delaware.

2/ The parties stipulated and I find that the Carpenters East Coast Industrial Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (hereinafter the Union or Petitioner) is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (hereinafter the Act).

3/ The Petitioner filed a petition seeking to represent employees in the following unit, which includes between 19 and 25 employees:

All staff nurses (LPNs, RNs), but excluding all unit managers, office clericals, and guards according to the Act.

The parties stipulated that the following employees are to be excluded from any appropriate unit as supervisors within the meaning of the Act: unit managers Renee Carey, Suk Kang, and Tracy Steele; infection control staff development coordinator Beth Sanabria; 3 p.m.- 11 p.m. supervisors Cheryl Wilkinson and Melissa Shaffer; and clinical reimbursement coordinator Marian White.

All parties agree that the petition was timely filed and that there is no contract which bars an election.

There is no history of collective bargaining between the Union and the Employer with respect to the above described petitioned-for Unit. The Union is currently the exclusive collective-bargaining representative of a unit covering the Certified Nursing Assistants employed by the Employer. The Union and the Employer are signatories to a collective-bargaining agreement which is in effect, by its terms, from July 1, 1996, until June 30, 1999. According to the terms of this agreement, the agreement shall be automatically renewed for successive one-year terms thereafter until terminated by written notice given by either party not less than 90 days prior to the expiration of the agreement.

DISPUTED ISSUES

Whether the staff nurses, including licensed practical nurses (LPNs), registered nurses (RNs) and 11 p.m.-7 a.m. charge nurse/supervisors, are supervisors within the meaning of Section 2(11) of the Act.

POSITIONS OF THE PARTIES

PETITIONER

The Petitioner contends that staff nurses, including the "11-7 supervisor for the house" (also referred to as "11-7 charge nurse/supervisor," "building supervisor" or "charge nurse of the facility"), are not supervisors within the meaning of the Act and thus the petitioned-for Unit is appropriate for the purpose of collective bargaining.

EMPLOYER

The Employer contends that the petitioned-for Unit is comprised exclusively of individuals who are supervisors within the meaning of the Act and thus the petitioned-for Unit is not appropriate for the purpose of collective bargaining. Accordingly, the petition should be dismissed.

BACKGROUND

The Employer operates a nursing home that provides long-term care to the elderly in Milford, Delaware. The facility houses 136 beds throughout the following three units of the facility: the South Wing, "Dementia" or "Focus" Unit (which has 32 beds); the Central Unit or the "Skilled Unit" (which has 50 beds); and the East Wing or "Immediate Care" (which has 54 beds). The facility operates 24 hours per day, 7 days per week, on three basic shifts: day (7:00 a.m. to 3 p.m.), evening (3:00 p.m. to 11:00 p.m.), and night (11:00 p.m. to 7:00 a.m.).

The Employer's operation is headed by Shirlynn Barnes, Administrator, to whom Director of Nursing (hereinafter DON) Janice Warrington reports. The Administrator works Monday through Friday, 8:30 a.m. to 5:00 p.m. The Director of Nursing (hereinafter DON), Janice Warrington, works from 7:30 a.m. to 4 p.m., Monday through Friday. Reporting to Warrington are three unit managers (hereinafter UMs), one infection control staff development coordinator, "11-7 charge nurse/supervisors"¹ and the "3-11" supervisors. There is one "11-7 charge/nurse supervisor present during the night shift and one "3-11" present supervisor during this shift. The nurses (also referred to as "charge nurses," a term which can encompass both

¹ The record testimony revealed that the full-time "11-7 charge nurse/supervisor" position (also referred to as "charge nurse of the facility" or "building supervisor") has been vacant since July 12, 1999, and the Employer is currently attempting to fill this vacancy. In addition, there are two relief 11-7 charge nurse/supervisors: Susan Manna and Charlotte Dare.

LPNs and/or RNs) report to the three UMs (one per unit), who typically work from 8 a.m. to 4 p.m., Monday through Friday. According to DON Warrington, who testified at great length in this proceeding, the certified nursing assistants (hereinafter CNAs) report directly to the nurse on the floor.

UMs are generally responsible for overseeing what is going on in the units in relation to the residents as well as the staff. Among other things, they review doctors' orders, lab reports, medication records, charts, nurses' notes, reports concerning falls, Medicare forms, and care planning. In addition, they make rounds with the nurses and the CNAs to make sure adequate care is being provided to the residents.

The Employer employs 48 to 50 CNAs and about 28 nurses (this number includes only those nurses who are at issue in the instant matter unit which excludes those nurses in senior administration). During the day shift (7 to 3), on the Central Unit, there are three nurses scheduled (which, as noted above, can be LPNs and/or RNs), and six CNAs. On the East Wing or Unit, there are two nurses, five CNAs and one restorative aide, who provides rehabilitative-type care. Lastly, on the South Wing, there is only one nurse scheduled as well as four CNAs. During the evening shift, on both the East Wing and the Central Unit, there are two nurses scheduled and four CNAs. On the South Wing, there is only one scheduled nurse, two CNAs plus one "3 to 9," CNA who works three quarters of a shift. As for the night shift, there are two CNAs and one nurse scheduled on each of the three wings. Overall, there are about 120 to 150 employees at the Employer's facility.

While there is no requirement as to exactly how many of the scheduled nurses on any of the above-mentioned shifts be RNs as opposed to LPNs, there is a State requirement that the facility provide RN coverage 24 hours a day, seven days a week. Therefore, it is necessary for at least one of the nurses in the building to be an RN. During the night shift, this RN is referred to as the "supervisor for the house" or "11-7 charge nurse/supervisor" as she is in charge of the building. DON Warrington testified that this position generally falls on the RN who is working on the Central Shift, if there is one. This individual is responsible for ensuring that care is being provided to the residents in addition to being responsible for the overall security of the facility, i.e., making sure the doors are locked so that individuals do not enter the facility during the middle of the night. Additionally, the RN supervisor for the house would be responsible for handling state surveyors or inspectors walking through the building during this shift. As in the case of the other charge nurses employed at the facility, the name tag worn by the 11 to 7 charge nurse simply states "Charge Nurse."

The record revealed that there is always a "Manager on Duty" (hereinafter MOD) who is on call on the weekend. This duty is rotated among department managers, i.e., maintenance, activity, social work, etc. Additionally, the record showed that there is always a "Nurse on Call," a duty which is rotated among the unit managers, the DON and the infection control coordinator. Whoever is "Nurse on Call" carries a beeper in order to take calls from the nursing department at any time in a "24 hour" time period. The nature of these calls could concern critical staffing shortages, the death of a resident, as well as other "serious or life threatening" incidents. In the case where a Nurse on Call is contacted due to a staffing shortage, this Nurse may actually come

in to work or provide other assistance depending on the situation. It was the testimony of DON Warrington that nurses have been advised to call her in the middle of the night if "they are uncomfortable with the numbers in the building" and that she has received such calls.

About half of the nurses are RNs and half are LPNs. DON Warrington testified that CNAs, who report directly to nurses on the floor, are responsible for making sure that the residents are properly fed, bathed, groomed and properly positioned. The nurses oversee the work done by the CNAs to ensure residents receive appropriate care. This is generally done when they make rounds or while distributing medication. In directing the CNAs in their work, DON Warrington testified that each of the nurses makes determinations as to how much supervision a particular CNA needs.

To become a CNA under Delaware State law, a certification test is required. Some CNAs who are hired by the Employer are already certified while others are not. For those who do not yet have certification, they must attend "in-servicing training" and then take the certification test. The infection control staff development coordinator conducts orientations of new CNAs where they review the facility's policies and procedures, mandatory OSHA requirements, fire plans, blood-borne pathogens, etc.

Nurses are primarily responsible for ensuring that care is provided in accordance with State, Federal and Company guidelines. To that end, the nurses may have CNAs take the residents' vital signs, temperature, blood pressure, etc. The nurses review the condition of a resident while in the room during a "medication pass" or while making rounds. If they see a task normally performed by a CNA that needs to be performed in relation to a particular resident, most nurses will not perform the task themselves, but will rather find a CNA who is available to perform the task. In addition, the nurses are responsible for notifying physicians of any issues involving the residents, getting orders changed, as well as ensuring that the CNAs have completed required paperwork in connection with the residents under their care on the unit. If this paperwork has not been completed by the end of the shift, the nurse may require the CNA to stay after the end of the shift in order to see that it is completed.

If a nurse sees a CNA performing a task incorrectly, he or she might provide an informal "on the spot in-servicing" in order to correct the CNA. In addition, the nurses are called upon to provide more formal "in-servicing" or training meetings. Darlene DeChicchis, a nurse that worked for the Employer until a few weeks before the hearing, testified that she has never conducted any sort of in-service training. On the other hand, RN Sheila Zook provided testimony that she reluctantly conducted formal "in-service" training for the staff with the assistance of another nurse after being asked to attend a seminar on the same subject.

The Human Resources Director is responsible for coordinating a master schedule for nurses and CNAs. This is done once a month; however, the schedule does not run in accordance with a calendar month. A new schedule is posted two weeks in advance of the conclusion of the posted schedule. From this master schedule, the Human Resources Director is also responsible for creating the daily schedule sheets in order to determine where there are staff vacancies. When necessary, temporary agencies are contacted for additional staffing. CNAs who are unable

to report to work are asked to give two hours notice when "calling in," however, this is not always the case, according to the DON. CNAs may also temporarily "swap" days with another CNA provided that they submit something to Human Resources in advance. Such requests, as well as vacation requests, must go to Human Resources, not the charge nurse.

DON Warrington provided testimony about how the "call in procedure" is to work "in theory": the call from the CNA who is calling in generally goes to a nurse on the central unit where the daily schedule is kept; the charge nurse completes a call-in form and can then attempt to find a replacement by consulting a list of available people kept at each of the nurses' stations and/or by calling a temporary staffing agency. The record indicates that there is no set procedure with respect to how the nurse proceeds down the list while attempting to locate replacements. LPN Hudson testified that she usually puts calls into all three temporary agencies used by the facility at one time until she is able to locate a replacement. These temporary agencies provide CNAs to the facility in exchange for which the facility pays the agency an hourly rate higher than that paid to the staff CNAs. A charge nurse is also authorized to ask a CNA to work a double shift without prior approval in order to cover the vacancy even if this will result in overtime. DON Warrington provided testimony concerning an "employee call-in report" received in evidence which had been completed by a nurse who had arranged to have an "agency CNA" remain beyond the end of her shift to cover a vacancy caused by another CNA's reported sickness. However, DON Warrington also testified, in response to questions by the Hearing Officer, that if the nurse had not authorized the expected absence of the employee who was calling in sick, the CNA could "appeal" this to the "3-11" supervisor if she were working at the time.

If, for example, despite the charge nurse's efforts to find replacements, there remains a shortage of staff during the 7 to 4 shift, typically one of the three nurses assigned to the Central Unit during this shift becomes involved in determining how to temporarily reassign the staff in order to cover the shortage. While there is some permanency in relation to the CNAs assignments, there are part-time CNAs used to relieve the permanent CNAs on their days off. Nurses may not permanently transfer CNAs from one unit to another without checking with anyone first. Nor may "3-11" supervisors or UMs permanently transfer a CNA from one unit to another prior to getting the DON's approval.

According to the DON's testimony, in determining where to allocate CNAs on days in which they are scarce, the charge nurse considers the following: the particular experience and skills of the CNAs who are available on a particular shift, including their ability to work with other members of the staff; the census of the facility for that particular day; and the needs of a particular unit on the day in question. These determinations are generally made in the beginning of the shift, before the UMs and DON arrive at the building. As for "call ins" occurring between 3 p.m. to 11 p.m., the individual who is calling in must speak with a supervisor. DON Warrington testified that this supervisor could be either a charge nurse or a UM. She further testified that any one of the following people could take responsibility for dealing with staff shortages: charge nurses; UMs; the Human Resources Director; the "3 to 11" supervisors if they have arrived; or even the DON. After receiving the call, one of the above-mentioned individuals completes a "call-in" report and attempts to fill the vacancy by following the above-described

process. If during the 11 to 7 shift, DON Warrington is not present at the facility, however, she testified that the RN in charge of the facility calls her at home. She conceded, however, that this does not occur as much as it previously did. Additionally, the UMs receive at home about two or three calls per week of this nature, as well as calls involving other matters.

LPN Hudson testified at hearing that she has exercised her authority to call in individuals, as well as temporary agencies, in order to cover shortages, without prior approval from a supervisory person, even where it resulted in a situation where overtime is incurred. In addition, she testified that she has instructed a CNA to stay beyond the end of her scheduled shift in order to complete paperwork. RN DeChicchis, on the other hand, testified she has never called an agency in order to obtain additional staffing and denied having the authority to do so. It was her sworn testimony that in April of 1999, DON Warrington advised the staff at a mandatory staff meeting that "absolutely no floor nurses, or CNA was to call the agencies. That it had to go through the MOD."

Nurses may send a sick employee home without prior approval, although DON Warrington underscored the importance of not having sick people around "immuno compromised" individuals such as some of the residents. However, she also testified that charge nurses have exercised the authority to change a CNA's schedule where the facility has been short-staffed and the individual has stayed over to work a double but was scheduled to work the next day. Such changes may be made without prior approval from another individual. On the other hand, RN Darlene DeChicchis, testified that she had no authority to "trade CNAs' days off." Nor could she allow individuals to arrive late. In fact, it was her testimony that she was explicitly told by a "3-11" supervisor that when faced with a call from a CNA concerning a late arrival, she was to write it down on the schedule in order to alert the UM and the DON. If the staff level were to fall below seven, she would immediately call the MOD as she testified she had been instructed to do. LPN Nurse Hudson testified that she has permitted a CNA to go home early without prior approval when the CNA's child was ill.

The Employer utilizes a "progressive disciplinary process" in relation to the CNAs which is set forth in the "Corporate Manager's Policy and Procedure Manual" as well as in the parties' collective-bargaining agreement. Under this process, verbal counseling is given initially, followed by a written warning. This is followed by a final written warning, suspension and, ultimately, termination. DON Warrington testified that nurses are authorized to give verbal "counselings" and verbal or written warnings without advance approval from upper management. When written discipline is necessary, nurses complete a disciplinary form, kept at the nurses' station, providing the following information: the name of the affected employee; their position; the date of the occurrence; and a description of the occurrence. LPN Mary Ellen Hudson testified that it is within her discretion to determine whether an individual should receive a written warning versus an oral warning. However, she admitted on cross-examination that she has never given a written warning. On one occasion, however, LPN Hudson recalled an incident on the East Wing during the afternoon shift when a CNA had refused to perform certain tasks. She explained to the CNA that she could either perform the task or go home. After being asked to do so by a supervisor, she wrote up a report on a blank piece of paper describing the incident. The supervisor met with Hudson and the CNA who was refusing to do the assignment, as well as

with another CNA who had also been involved in the situation. During this meeting, the CNA who had refused to follow the order argued with the supervisor when she was told that she would have to leave the facility. Eventually, this incident resulted in the CNA's discharge.

For serious offenses, such as patient abuse, nurses may order a CNA to leave the building without prior approval. When completing the discipline form, sometimes a nurse may not indicate whether the warning is written or verbal because the nurse is not certain as to what kind of prior discipline the affected employee has received. Accordingly, the nurse may leave blank the section of the form that indicates the type of "disciplinary action being taken," i.e., written, verbal, etc. This section would be completed at a later time by the DON or a UM.

Once the disciplinary form is completed, it is signed by the nurse and the employee and kept in the employee's file. These files, which contain disciplinary forms, evaluations, payroll records, and hiring forms, among other things (except for medical information, which is maintained in a separate file), are maintained in the human resources office. While these files are stored in a locked cabinet at night, DON Warrington averred that nurses could access these files during the day and have been advised that they have the authority to do this. She was unaware, however, of any instance in which this has occurred. At night, no one has access to these files. RN DeChicchis, during her testimony, denied having access to these files.

According to DON Warrington, the nurses are not only advised of their authority to discipline the CNAs through "in-servicing" or training, as well as in staff meetings, but are also evaluated, in part, on how well they perform their supervisory responsibilities. At hearing, the Employer presented a number of nurses' evaluations which reference skills such as: disciplining; teaching; training; correcting; overseeing and coordination of nursing personnel "in providing direct patient care"; and delegation of assignments. Moreover, LPN Hudson testified that she has received "in-servicing" from UMs who have instructed her that she needed to start supervising the CNAs more. On the other hand, RN DeChicchis testified that she has written up CNAs only with the purpose of reporting "patient care infractions" to a supervisor but received no feedback concerning the infractions she reported. She further testified that she was never told she had the authority to discipline a CNA. In response to questions by the Hearing Officer, however, DeChicchis testified that there was an occasion in which she had observed that the CNA had left a resident "in a state that was very dirty," whereupon she immediately showed the "3 to 11" supervisor the resident's condition. Nurse DeChicchis notified the supervisor that she "felt this needed some addressing" and gave the supervisor a write-up. She denied, however, making any sort of recommendation in this write-up.

During the hearing in the instant matter, there was a substantial amount of documentary evidence received in evidence showing instances in which nurses signed disciplinary notices for infractions involving deficient patient care (i.e., inappropriate behavior in vicinity of residents; the condition of a resident; failing to report to the nurse when leaving the floor "so residents can be monitored for safety"). Other disciplinary notices involved matters not directly related to patient care such as "inappropriate attitude" with supervisor or insubordination. While most of these disciplinary notices resulted in warnings, a few were the basis for more severe immediate discipline such as suspension or even termination. It is unclear from the record, however,

whether the employee's prior discipline on record, if any, played any part in the issuance of such discipline.

In some instances, the UM will sit it on the disciplinary meeting between the nurse and the CNA, although this would depend on the incident and the nurse involved because "some nurses are more reluctant than others to become involved" in the disciplinary process, explained DON Warrington, although they are authorized to do this without any UM involvement. In the case where the UM has been notified of a problem, the nurse will write up the discipline and either review it with the employee alone or with the employee and the UM present.

After the nurse initiates and signs the discipline, the DON reviews it. DON Warrington testified that if she doesn't agree with the action that has been taken, she would review it with the nurse and CNA to "make them aware of any changes that are made," however, "most of the time I don't change them." On re-direct examination, she averred that she has never revoked discipline for a CNA written up by a nurse. She further testified that she doesn't always speak with the nurse who initiated the discipline. According to DON Warrington, there is some sort of recommended action when individuals are written up.

Of the disciplinary notices that were introduced at hearing, some contained recommendations. For example, in one "Corrective Action Notice" dated January 29, 1999, the nurse responsible for writing up the CNA for a resident care-related problem appears to have written the following in the section of the form asking "what disciplinary action is being taken now and what disciplinary action will be taken if the problem situation continues": "this is a verbal warning, if condition persist then will be a written." In another notice, dated April 26, 1999, in which a CNA was given a written warning for apparently failing to report to nurse when leaving the floor, the RN signing the notice wrote, "CNA must report to nurse when leaving the floor so her residents can be monitored for safety." In another disciplinary notice dated March 27, 1999, the nurse, who signed the form on the line designated "Supervisor" appears to have written, "oral warning if done again written warning."

On the other hand, however, some of the notices do not contain any sort of recommendation. For example, in a notice dated November 15, 1998, a CNA was written up for "attitude" and "conduct", however, no box was checked indicating the type of discipline. Moreover, the form does not indicate if any particular recommendation was made by the nurse, who simply summarized the incident in a reportorial fashion under the heading "Supervisor's Remarks." On the same date, a nurse gave an oral warning to a CNA for "Substandard Work." On this form, it appears that the nurse, who signed the form as the Supervisor, reported an incident involving patient care. No recommendation was made in this report concerning "Action to be Taken" other than the oral warning. In a written warning dated December 31, 1996, concerning an incident involving resident safety, DON Janice Warrington signed the notice on January 3, 1996. In what appears to be her handwriting, she wrote, "Any further problem with insubordination will result in disciplinary action up to including termination." Other than describing the incident leading up to the "violation", the nurse does not make any sort of recommendation concerning discipline on the notice itself.

The record also revealed that the nurses play a part in the evaluation of the CNAs, which are written and often annual in nature. The UM shares this responsibility with the nurses by soliciting their input regarding their assessment of the CNAs' strengths and weaknesses. This is accomplished by the UM either simply gathering the information in oral form from the nurses or by having the nurses actually complete certain parts of the evaluation form based on his or her own assessment of the employee's performance. According to DON Warrington, "time constraints" often times necessitate that the UM complete the form after gathering the information from the nurses. Therefore, the UM would actually complete the two-sided evaluation form in which the CNA is rated in different areas such as: attendance; accuracy/quality; alertness; quantity; job knowledge; etc. On the back of this evaluation form, there is a place for the CNA's strengths, weaknesses, and goals and objectives. Warrington testified, however, that while many parts of the evaluation form can be completed by either the UM or the nurse, the area concerning "departmental or personal objectives" is typically completed by the UM, however, both nurses and UMs can complete the section referred to as "Supervisor's Comments."

Regarding bonuses, the record showed that nurses have recommended certain CNAs for cash bonuses, generally when they have worked on their day off. This bonus is subject to the Administrator's approval. In addition, DON Warrington recalled an incident where a nurse recommended that a CNA and the receptionist receive bonuses for "doing something special for a resident." These discretionary bonuses were approved. RN DeChicchis testified that she had the ability to recommend someone for a bonus and provided an example of an instance in which she had submitted to the DON such a recommendation in writing. However, she never learned what became of it.

As in the case of the disciplinary notices, the Employer introduced in evidence numerous evaluations in which the nurse had some involvement in completing the evaluation and/or signed the actual form. There was also testimony that the charge nurses participate in the actual meeting, when time permits, where the evaluation is reviewed with the employee and the UM. According to DON Warrington, while the evaluations no longer lead to merit raises for the CNAs under the terms of the effective collective-bargaining agreement, they are useful in the disciplinary process and are kept in the employee's personnel file. While the UM possesses the authority to make changes to the parts of the evaluation actually completed by the nurse, DON Warrington testified that the form would note such a change. Of the evaluations received in evidence at the hearing in this matter, there are none which reflect such any instances in which a charge nurse's rating was changed by a UM. LPN Hudson corroborated DON Warrington's testimony by testifying that she has been asked by UMs to fill out the entire evaluation form with the exception of the section pertaining to attendance, which she was unable to do. On other occasions, she was simply asked by the UM to give her opinion of the CNA's job performance. She has not, however, ever sat in on a meeting between a UM and the CNA concerning the CNA's evaluation. RN Darlene DeChicchis testified that she has only been asked for input on the CNA's patient care skills but "never heard a word about it" after the input was provided. Later in her testimony, however, she explained that her involvement was limited to the following: the UM showed her the performance levels concerning the CNA's work; DeChicchis then initialed the particular level she selected but did not sign the evaluation. Similarly, RN

Zook testified that she has completed evaluation sheets pertaining to the CNAs who worked with her on the "11 to 7" shift because she "knew their good qualities." However, she was not asked to sign them nor did she sit in on the evaluation meeting between the UM and the CNA.

In addition to fielding complaints made by a resident's family concerning their care, nurses also become involved in resolving CNAs complaints. For example, CNAs will go to their nurse if they wish to "swap residents" under their care or if they feel that other CNAs are not doing their "fair share." The record revealed that nurses resolve these sorts of complaints by asking another CNA to take on a particular resident or by instructing a CNA to perform a task. LPN Mary Ellen Hudson testified that in addition to resolving the above described grievances, she has been involved in instances in which a CNA has complained of not having enough time to take a break and that her response consisted of instructing the CNA to take a break. The record does not reveal any instances in which a nurse was present during the processing of a formal grievance filed in accordance with the grievance procedure set forth in the parties' collective-bargaining agreement.

The nurses do not have authority to hire, discharge, promote, give raises, or approve vacation for the CNAs. While there was testimony that nurses have the authority to suspend an employee, this would depend on the circumstances and no examples of this were provided. CNAs are responsible for "signing out with their charge nurse" when going on break. DON Warrington testified that this nurse is authorized to tell the CNA that "this is not a good time" to go on break if "something is going on in the unit." Similarly, LPN Hudson testified that she monitors the breaks of CNAs and has, on one occasion, called a person back from break early because she required their assistance.

As for the "11-7" RN, Darlene DeChicchis testified that while employed by the Employer, she was designated as the "Building Charge Nurse" because she was the only RN on duty but she denied being in charge of the building during that time period while assigned to the Central Unit. Received in evidence as Employer's Exhibit 27, however, was an undated letter from DeChicchis to the DON wherein DeChicchis complained about the Employer's break policy. Therein, she referred to herself as the "building supervisor" as well as the "charge nurse of the facility" because she is the only RN during the "11-7" shift. Nonetheless, during the hearing concerning the instant matter, she repeatedly denied being the "building supervisor." While testifying, she explained that as "senior charge nurse" she was responsible for notifying the "proper personnel," in situations where a "state surveyor" visited the facility or in an emergency situation such as a fire. During her two years in which she served as the "11 to 7" charge nurse, she testified that she was never faced with a situation in which she had to resolve any sort of grievance or complaint by a CNA. Finally, there was no additional pay for serving as the "11-7" RN.

As for pay, the CNAs earn between \$6.50 and \$12 per hour. LPNs earn between \$12.50 and \$19 per hour and RNs earn between \$15 and \$26 per hour, although DON Warrington testified on cross-examination that she was unaware of any RNs earning \$26 per hour. The "3-11" supervisors earn between \$18-19 per hour, as do the UMs. As noted by counsel for the

Petitioner on brief, the Employer has separate job descriptions for each of the following positions: "RN Nursing Supervisor", "Licensed Practical Nurse" and "Registered Nurse."

THE STATUS OF THE NURSES

Section 2(3) of the Act excludes from the definition of "employee" "any individual employed as a supervisor." Section 2(11) defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In determining whether a person is a statutory supervisor, the Board examines whether the person in question exercises any of the functions listed in Section 2(11), uses independent judgment in performing any of those supervisory functions, and does so in the interest of management. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-74 (1994); Hydro Conduit Corp., 254 NLRB 433, 437 (1981). In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees, such as "straw bosses, leadmen, set-up men, and other minor supervisory employees," who enjoy the Act's protections even though they perform "minor supervisory duties." NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974) (quoting Senate Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). Consistent with this congressional intent, the Board has long recognized that often times highly skilled employees whose primary function is physical participation in the production or operating processes of their employer's plants and who incidentally direct the movements and operations of less skilled subordinate employees are not supervisors within the meaning of the Act, because their authority is based on their working skills and experience and not in the possession of supervisory authority as defined in Section 2(11) of the Act. Southern Bleachery & Print Works, Inc., 115 NLRB 787, 791 (1956), enforced, 257 F.2d 235 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959); Gulf Bottlers, Inc., 127 NLRB 850, n. 3, 858-61 (1960), enforced sub nom, United Brewery Workers v. NLRB, 298 F.2d 297 (D.C. Cir. 1961); Koons Ford of Annapolis, 282 NLRB 506, 513-14 (1986), enforced, 833 F.2d 310 (4th Cir. 1987), cert. denied, 485 U.S. 1021 (1988).

A party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. Golden Fan Inn, 281 NLRB 226, 229-30 n.12 (1986) see also Northern Montana Health Care Center, 324 NLRB 752 (1997); Bennett Industries, 313 NLRB 1363 (1994); The Ohio Masonic Home, 295 NLRB 390, 393 (1989); The Dickinson-Iron Community Action Agency, 283 NLRB 1029, 1034 (1987); Tucson Gas & Electric Co., 241 NLRB 181 (1979). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193

(1991). Furthermore, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." Phelps Community Medical Center, 295 NLRB 486, 490 (1989).

Applying these criteria to the instant case, I conclude that nurses and the "11-7 charge/nurse supervisors," are supervisors within the meaning of Section 2(11) of the Act. The record shows that they have the authority to issue written warnings, effectively recommend discipline and evaluate CNAs, as well as recommend CNAs for bonuses. The Union contends that the Employer has failed to establish that the nurses are supervisors within the meaning of the Act. As detailed fully below, I disagree with the Union's contention. The record as a whole shows that nurses do possess some supervisory authority imputed to them by the Employer, and/or exercise that authority by using independent judgment as required by Section 2(11) of the Act. Accordingly, I will not direct an election in the petitioned-for Unit.

Discipline

The Employer argues that the nurses are supervisors under the Act because they have the authority to issue discipline and can send a CNA home for resident abuse. With respect to the authority to send CNAs home, when such authority is limited to situations involving egregious misconduct, i.e., behavior which endangers the health or safety of the patients, the Board has held that this would not constitute statutory supervisory authority. Vencor Hospital-Los Angeles, 328 NLRB No. 167. (1999). Therefore, I cannot find that the nurses exercise supervisory authority based on the fact that they can send CNAs home for resident abuse.

As noted in detail above, however, the record does show that the nurses have the authority to give written warnings to the CNAs without prior approval from anyone and without the benefit of an independent investigation conducted by higher management. Although the evidence revealed that not all nurses at the Employer's facility are completely comfortable with the notion of having to exercise this authority and may even attempt to avoid exercising such authority, it is clear that the nurses are not only instructed to supervise the nursing personnel, but are also consistently evaluated on, among other things, their ability to supervise the nursing personnel, including issuance of discipline.² In any event, the record demonstrated that the authority to issue written discipline has been exercised by the nurses on a regular basis. While the DON reviews the discipline issued by the nurse and may revoke it if she disagrees, the record revealed no examples of such a situation. In fact, DON Warrington testified that in most cases, she doesn't change the disciplinary notices before signing them.

Based on the foregoing facts, I find that the disciplinary notices prepared by the nurses in this case are not simply reportorial in nature. Rather, I find that this constitutes an exercise of supervisory authority within the meaning of Section 2(11) of the Act. While the Board has

² A supervisor cannot shed her supervisory status under 2(11) of the Act by failing to perform supervisory duties in a satisfactory manner. Cory Coffee Services, Division of Cory Food Services, Inc., 242 NLRB 601 (1979).

consistently held that individuals with the authority to give employees oral or written warnings which are retained in the employee's file are not supervisors because their warnings do not result in any personnel action, or, if they do, such action is not taken without independent investigation (See, e.g., Ten Broeck Commons, 320 NLRB, 806, 812 (1996)), this is clearly not the case here.

Evaluation and Bonuses

The Employer also argues that the nurses are supervisors under the Act because they have the authority to evaluate CNAs. The record established that the nurses play a significant role in evaluating the CNAs. Counsel for Petitioner argues on brief that while the nurses may be asked for their input, the nursing home's Administration is free to disregard the nurse's opinion of the CNA's job performance. The record showed, however, that in preparing these evaluations, the UMs seek input from the nurses and even asks them to complete portions of the two-page evaluation form. This involvement includes the selection of the specific ratings to be given to the CNA in each performance area. While it is true that the evaluations are not completed exclusively by the nurses, the Board has consistently found supervisory status when nurses independently perform employee evaluations which lead directly to personnel actions.

The nurses' duties with respect to the evaluation of the CNAs in this case surpass those at issue in Vencor Hospital, *supra*, where the Board concluded that RN team leaders do not use independent judgment to complete evaluations inasmuch as the evidence there failed to show how much weight is given to these reports in determining the appropriate evaluation and whether the evaluations have a direct correlation to the evaluated employee's pay or retention. Here, the record evidence showed that these evaluations do have a direct effect on the employees' job status even if they do not have a direct impact on the CNA's pay. See, First Healthcare Corporation d/b/a Hillhaven Kona Healthcare Center, 323 NLRB 1171 (1997).

Moreover, the record evidence revealed that the nurses recommend CNAs for cash bonuses. While counsel for the Union correctly points out that these bonuses must be approved by the Administrator, the record shows that the recommendations made by the nurse have been acted upon as a result of the recommendation. This constitutes independent judgment on the part of the nurses because these discretionary bonuses are not simply given out on an automatic basis. Pine Manor Nursing Center, 270 NLRB 1008 (1984).

For the foregoing reasons, I find that the nurses have the authority to evaluate and effectively recommend CNAs for bonuses within the meaning of Section 2(11) of the Act.

Adjustment of Grievances

The Employer argues that the nurses are supervisors under the Act because they have the authority to adjust grievances for CNAs. The record provided examples of instances in which nurses have received complaints from CNAs concerning work-related matters such as resident assignments and workload issues. While the nurses have resolved such matters in response to

these complaints, the record indicated that such intervention is informal in nature and not final or binding. The Board has held that such limited and non-binding role in resolving disputes between employees is not indicium of supervisory authority. See Illinois Veterans home at Anna L.P., 323 NLRB at 891. Accordingly, I find that nurses do not have the authority to adjust employee grievances within the meaning of Section 2(11) of the Act.

Assignment and Responsible Direction

In determining whether nurses' assignments and directions to CNAs render them statutory supervisors, the Board decides whether the assignments and directions given require independent judgment or whether such assignments and directions are merely routine. The Board has noted that "[t]here are no hard and fast rules; [] each case turns on its own particular facts." Providence Hospital, 320 NLRB 717, 725 (1996). Board precedent clearly establishes, however, that not all assignments and directions given by an employee involve the exercise of supervisory authority. See, e.g., Northern Montana Heath Care Center, 324 NLRB 752 (1997); Illinois Veterans Home at Anna L.P., 323 NLRB 890 (1997); Washington Nursing Home, Inc., 321 NLRB 366 (1996); Providence Hospital, 320 NLRB 717, 725 (1996); Ten Broeck Commons, 320 NLRB 806 (1996). Supervisory status is found only where a person's role in assigning and directing the work of others requires the exercise of "independent judgment" as that term is used in Section 2(11) of the Act. Washington Nursing Home, Inc., 321 NLRB 366 n.4 (1996). In the present case, I find that the nurses' role in assigning and directing the CNAs is merely routine and, consequently, does not constitute supervisory authority within the meaning of Section 2(11).

The Employer asserts that the nurses at issue in the instant matter are supervisors because they have a significant role in the daily assignment of work to the CNAs and direct CNAs to perform non-routine tasks. There was record testimony that the nurses assess the skills of the CNAs in determining the level of supervision necessary. However, in cases in which the nurses regularly take into consideration the relative ability of CNAs in assigning and directing their work, the Board has consistently held that the use of such judgment stems from the nurses' professional expertise and not from supervisory authority. See, e.g., Illinois Veterans Home at Anna L.P., 323 NLRB at 891; Washington Nursing Home, Inc., 321 NLRB at 366 n.4; Providence Hospital, 320 NLRB at 727-30; Ten Broeck Commons, 320 NLRB 809-12. As the Board noted in Ten Broeck Commons:

LPNs' supervision of CNAs is narrowly circumscribed to giving rather general, routine directions to lesser skilled employees in order to maintain the quality of their work. This type of authority is typical of that of the industrial strawboss and leadman, skilled employees with only limited authority, who are routinely excluded from the definition of supervisor.

Ten Broeck Commons, 320 NLRB at 812. The Board has similarly held that the authority to decide when aides can take their breaks is routine in nature. Washington Nursing Home, Inc., 321 NLRB at 366 n.4.

The record evidence concerning the assignment of work, as well as the controlling Board precedent, shows that the “judgment” exercised by nurses here is the expert “judgment” exercised by professional employees, not the “independent judgment” exercised by supervisors. See generally Northern Montana Heath Care Center, 324 NLRB 752 (1997); Providence Hospital, 320 NLRB 717 (1996); Ten Broeck Commons, 320 NLRB 806 (1996).

On brief, the Employer argues that the nurses should be found to be supervisors because they reassign CNAs and can incur overtime expenses. However, the Board has repeatedly held under similar circumstances that such authority does not require the exercise of “independent judgment” within the meaning of Section 2(11). See, e.g., Illinois Veterans Home at Anna L.P., 323 NLRB, 890, 891 (1997); Washington Nursing Home, Inc., 321 NLRB at 366 n.4; Providence Hospital, 320 NLRB at 731-32.

For the foregoing reasons, I find that the nurses do not have the authority to assign and responsibly direct CNAs within the meaning of Section 2(11) of the Act.

CONCLUSIONS

In light of the foregoing, I find that the nurses, including the "11-7 charge nurse/supervisor", are supervisors within the meaning of Section 2(11) of the Act. Therefore, the petition is hereby dismissed.

177-8520-0100; 177-8520-0800; 177-8520-1600; 177-8520-2400; 177-8520-3900;
177-8520-4700; 177-8520-7800; 177-8560-1000; 177-8560-2800; 177-8580-8050;
177-9762.

